

# The Return of the Hungarian Constitutional Court

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Hungary's 2011 constitutional reform also brought along the reform of the election system as a whole. The new constitution (Fundamental Law) extended the right to vote to all Hungarian citizens, irrespective of their country of residency (Article XXIII), and corresponding legal rules were enacted to make the acquisition of citizenship easier for Hungarians living abroad. The whole-scale election reform was complete with the introduction of a new central (national) voter registry. To be eligible to vote in the next national election, citizens were meant to individually apply to be listed in the central registry before the elections. The new central registry was meant to replace the old system, used since 1990, where the national list of voters was compiled automatically, via transferring voters' names from the national population and residency databases.

The government communicated the election reform as a strong policy preference and defended the idea of conditioning the rights to vote on prior registration in the face of massive political and academic criticism. In order to make way for the new election rules parliament amended the Transitional Provisions of the Fundamental Law on November 9, 2012 to add a provision on prior registration as a precondition to the right to vote. The bill on the election reform was then passed on November 26, 2012. The president of the republic refused to sign the election bill into law and referred several provisions for preliminary review before the Constitutional Court.

In its first decision of the new year of January 7, 2013 the Constitutional Court agreed with the president of the republic and found the challenged provisions of the election bill, among them the rules on the central voter registry, unconstitutional [Decision 1/2013 (I. 7) AB]. This decision was indeed prepared by the Constitutional Court's last decision of 2012, finding key articles in the Transitional Provisions of the Fundamental Law unconstitutional upon the request of the ombudsman [45/2012 (XII. 29.) AB]. Among the provisions invalidated in December 2012 the Constitutional Court included the amendment introducing the constitutional basis of the application based central voter registry. Together these two decisions signal a timely and most welcome awakening of the Hungarian Constitutional Court.

Lately the turn of the year has been formative for Hungarian constitutionalism. While the new Hungarian constitution, the Fundamental Law was signed into law on Easter Monday of 2011, right before its entry into force on January 1, 2012 parliament added a set of Transitional Provisions to it in the latest days of business in December 2012. These Transitional Provisions included not only a two-page long condemnation of communism but also additional provisions to expand the new Fundamental Law. In order to clarify the constitutional status of the Transitional Provisions, parliament enacted the First Amendment to the Fundamental Law on

June 18, 2012. According to this amendment the Transitional Provisions form part of the Fundamental Law.

The ombudsman challenged the constitutionality of the Transitional Provisions before the Constitutional Court. In a 10-to-5 decision of late December 2012 the Constitutional Court found that those provisions in the Transitional Provisions and in subsequent amendments which contain additional substantive constitutional rules were enacted in excess of the constitutional delegation of power to enact transitional provisions to the new Fundamental Law are invalid. The Constitutional Court refused to see the Transitional Provisions and their subsequent amendment as a constitutional amendment or as an addition to the Fundamental Law. The substantive articles of the Transitional Provisions were found ultra vires for their temporal scope as well as for their subject matter.

According to the Constitutional Court the new Fundamental Law was meant to be a lasting and complete foundation of the Hungarian legal system. This is reflected in the postamble of the Fundamental Law which refers to the new constitution as “the first unified Fundamental Law of Hungary.” With enacting the Transitional Provisions right before the entry into force of the new Fundamental Law, then amending the Fundamental Law in June 2012 to incorporate the Transitional Provisions and then amending the Transitional Provisions (with an amendment the title of which refers to the Fundamental Law) on elections in November 2012 parliament generated serious uncertainty as to what constitutes the body of the constitution. This uncertainty was regarded as a violation of the principle of the rule of law [Article B(1), Fundamental Law].

The Constitutional Court also noted that Transitional Provisions amounted to a limitation on the constitutionally established jurisdiction of the Constitutional Court itself and were not acceptable as such. The Court emphasized that under the new Fundamental Law it was the constitutional responsibility of the Court to protect the unity of the constitution, and to ensure that the text of the constitution can be clearly identified. The justices added that an amendment of the constitution cannot create a unresolvable inconsistency in the text of the constitution.

Accordingly, the amendment of the Transitional Provisions of the Fundamental Law of November 9, 2012 which made the right to vote dependent on prior individual application to be included in a central voter registry was found invalid by the Constitutional Court. When the president of the republic referred the new election bill for preliminary review to the Constitutional Court in November 2012, he certainly could not expect the decision of the Constitutional Court to make his case so easy. The president’s petition against the election bill requested the Constitutional Court to assess whether the prior registration requirement was a proportionate limitation of the right to vote.

In another 10-to-5 decision the Constitutional Court found that lacking a constitutional foundation for an application-based central voter registry, the necessity of application requirement had to be assessed as a permissible limitation of the right to vote. The Constitutional Court found that although the Fundamental Law extends the right to vote to non-resident citizens [Article XXIII], this change does not require

an application process for resident citizens. The Constitutional Court repeatedly emphasized that as far as citizens residing in Hungary are concerned, voters are accounted through data from the population and residency registers, therefore an individual application procedure is redundant.

The January 2013 decision of the Constitutional Court on the election bill was not a major surprise following the December decision on the unconstitutionality of the Transitional Provisions which essentially removed the constitutional basis of the reform. It was still rather unfortunate how it was openly rumored in the press that the government knew about the essence of the decision weeks before the Court announced it. It still came a surprise mixed with relief when a senior government politician announced in response to the decision of the Constitutional Court that although the government could reinstall the constitutional basis of the prior registration regime with a constitutional amendment right away, it decided not to pursue this avenue for the time being.

Beyond the immediate words of these two decisions, first, it is a most welcome development that the Constitutional Court spoke up in no uncertain terms about its disapproval of the frequent constitutional amendments of 2011 and the numerous adjustments to the new constitution. In the December 2012 decision the Court noted that many provisions included in the new constitution did not pertain to constitutional issues at all. The Court's concern for the unity of the constitution and for the integrity of its own jurisdiction resonates particularly soundly against this background.

Indeed, the Constitutional Court emphasized the obligation the constitution maker to observe requirements of the rule of law and legal certainty when exercising its constitution making powers. The Court set several constitutional criteria even when it note that parliament is certainly free to reenact the invalidated provisions as an amendment to the Fundamental Law itself.

Secondly, in these decisions the current majority of the Constitutional Court provided ample guidance on how they situate the new Fundamental Law against the constitutional corpus of the past 20 years. It is very clear that the Court is split on this issue. Dissenters in the voter registration case placed much emphasis on the need to redefine the right to vote in terms of the new relationship of rights and responsibilities as enshrined in the new constitution. They would also have preferred a strong emphasis on the communal aspect of the right to vote in preserving national identity in terms of the National Avowal.

In contrast, the majority preferred to strongly rely on the jurisprudence of the Constitutional Court as developed under the old, 1989 Constitution. E.g. in a smaller issue the justices made it clear that while the new Fundamental Law does not have a provision on respect for equal dignity of human beings, the new provision on equality before the law [Article XV(1)] has to be read as a formulation of the requirement of non-discrimination as treating persons as subjects of equal dignity, as developed in the prior jurisprudence of the Court. Similarly, in the decision on the constitutionality of the Transitional Provisions, speaking up against the uncertainty of the text of the constitution, the Court noted that the level of protection afforded to constitutional

values and guarantees under the new Fundamental Law cannot be lower than as established under the previous Constitution.

Lastly, while in these last two decisions the Constitutional Court clearly grappled with the government, it appears that the Court is not without an audience and not without allies in the public square. Access to the Constitutional Court is more limited than before, when *actio popularis* was the main avenue of challenging unconstitutional legislation. As the newly introduced constitutional complaints take time to trickle down the hierarchy of ordinary courts, the ombudsman and the president of the republic – at least for the time being – inhabit an even more precarious watchdog function. Thus, those with standing before the court are as an important audience of constitutional arguments as the justices themselves. So far the stakeholders of these debates seem to be mindful of their transformed professional and communicative positions.

As if to offer some reassurance and even encouragement, in these last decisions the Court appears to signal that the justices are mindful of their broader domestic and international audience, and are keen to speak the language of European constitutionalism. References to the opinions of the Venice Commission and European human rights jurisprudence are certainly not new from the Hungarian Constitutional Court. The Court's analysis of foreign law and jurisprudence may be read as a reaffirmation of the commitment to hold the new Hungarian constitution and its operators to the standards of European constitutionalism. Continued conversations on these standards may assist the Court in its upcoming decisions.

